In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 31

THOMAS MICHALIC,

Petitioner,

vs.

CLEVELAND TANKERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS.

TABLE OF CASES.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Whether in an action for personal injuries under the Jones Act the Courts below were justified in granting (and affirming) defendant's motion for a directed verdict where there was no evidence from which the jury could make a finding of negligence or unseaworthiness as a proximate cause of the injuries sustained?

COUNTER-STATEMENT OF FACTS.

The petitioner, prior to working for the respondent, was a member of the crew of the Steamer William Irwin of the Pittsburgh Steamship Company. During the season of 1951, while on that vessel he dropped a sack of cement on his left foot (the leg involved here) as a result of which

he was hospitalized. During 1952 he was advised by a doctor that he was suffering from the serious circulatory ailment known as Buerger's disease (17, 20). The petitioner was aware of the nature of the disease and its serious implications (20).

At the time of the alleged accident, the date of which the petitioner could not fix, except that it happened in December 1955 (8), he did not report it to the pumpman who was working with him in the pumproom (19). It was not reported to any officer of the Orion until April 1, 1956 (20). The petitioner performed his duties during the lay-up of the vessel in December and left her at the conclusion of the lay-up on January 6, 1956 (70). He rejoined the Orion on March 15th for fit-out and left the vessel and returned to his home in Erie, Pennsylvania, on April 1 (13, 14, 16). He reported to the Marine Doctor in that city. During the early part of April he went into the Detroit Marine Hospital where several amputations on his left leg were performed (17).

The bolts which the petitioner was removing at the time of the alleged accident were on the casing of the centrifugal pump located on the port side of the pump room (105, Respondent's Exhibit C). There were approximately twenty bolts and nuts on the casing or flange and the petitioner had removed all but five or six of them when the wrench allegedly slipped off one of the nuts and dropped on the big toe of his left foot (22, 28, 57).

The petitioner, by his own admission, had no difficulty seeing the nuts at the time he was engaged in removing them (26).

The wrench which the petitioner was using was a 1⅝ inch open-end type, approximately twelve inches long and weighing about 2½ pounds. It was made of a spark

proof alloy and, according to Hans Hansen, the pumpman, who gave it to the petitioner, was in good condition, without any chipped or worn places on it (69). All of the tools in the pump room, consisting of different size wrenches and hammers to do specific jobs, are made of the special non-sparking alloy. They are used only in the pump room and are used only once or twice a year (58, 73, 80). The wrench, which the petitioner used, was examined by the pumpman just prior to the commencement of the work (73).

There is no proof in the record as to the physical properties of the alloys of which the non-sparking wrenches were made. The remarks made by opposing counsel (Br. p. 6) concerning those properties are wholly gratuitous and without any evidentiary support.

The petitioner was a fireman on the Orion. His duties during the navigation season related principally to the firing of the boilers. During the lay-up and fit-out, it is part of a fireman's duties to work on the pumps and valves (61, 62).

Harold Isenbach, who testified on behalf of the petitioner, was Second Mate on the Orion in December 1955 (36). His testimony concerning the condition of the pumproom tools related principally to December 1955 (41). When it became apparent, on cross examination, that he had left the vessel on December 19, 1955, and did not return until the fit-out in March, 1956, his testimony relating to conditions on board the vessel on December 28, 1955, was stricken (47).

The only reference which the Court below made to Isenbach's testimony was the following description of the pumproom tools, as being:

> "* * * in beaten and battered condition * * * they had been very beaten and battered." (108)

At the close of the respondent's case the Trial Court granted the respondent's motion for a directed verdict on the first cause of action on the ground that there was no evidence from which the jury could make a finding of negligence or unseaworthiness (98).

The parties stipulated that the petitioner was entitled to recover the sum of $2,610.00, as maintenance and cure. A judgment dismissing the first cause of action and ordering recovery of the above amount from the respondent was entered on February 27, 1958 (99).

On October 29, 1959, the Court below, in a *per curiam* opinion, affirmed (106-114).

SUMMARY OF ARGUMENT.

This case does not involve a weighing of the evidence to determine whether an issue of fact existed. It presents a situation where there was no evidence upon which the jury could have based a finding of negligence or unseaworthiness.

The District Court properly found, and the Court below properly affirmed, that there was no proof establishing that the wrench was inadequate to perform the function for which it was being used. The description of the wrench as "old, beaten, battered or chewed up" gave no information concerning the condition of either the open end or the grip and the use of these adjectives was not sufficient to permit an inference that it could not be used safely in removing the nuts. The fact that the wrench slipped is not evidence that its slipping was the consequence of some defect in either its jaw or its handle.

There was no proof that the slipping of the wrench was brought about or related to the lighting conditions of the pumproom, or the alleged smallness of the working

area. The petitioner made no claim that the progress of the work was hampered, in any way, by inadequate lighting or cramped quarters. He admitted he had no difficulty seeing the bolts on which he was working and had, in fact, virtually completed the job at the time the accident occurred. The petitioner, himself, removed from the case the issue as to whether a safe place to work had or had not been provided.

The ruling of the District Court, as affirmed by the Court below, was not predicated alone upon a failure to prove the allegations of the complaint. The primary basis of the ruling was the complete lack of proof of a defect which was causally connected with the slipping of the wrench.

Although this Court has ruled that a case must be submitted to the jury if "the proofs justify, with reason, the conclusion that the employer's negligence played any part, even the slightest, in producing the injuries for which damages are sought," it has not abrogated, in any way, the requirement that the evidence must be such that fair-minded men may draw different inferences and that there must be an evidentiary basis to support the jury's verdict. It is still the function of the Trial Court to determine whether that "evidentiary basis" exists.

ARGUMENT.

POINT I.

An examination of this record will reveal that there was no evidence from which the jury could have found that negligence of the respondent or unseaworthiness of the vessel and equipment contributed in any degree, to the slipping of the wrench and its falling on the petitioner's foot.

One of the most cogent arguments in opposition to the petitioner's unsupported conclusion that he had been supplied with a defective wrench, was his own admission that the tool was adequate for the purpose for which it was being used during fifteen-twentieths of the operation involved (22). If, in fact, the wrench did drop, that could have occurred for one of many reasons, none of which would involve the vessel owner, or the vessel, in any way. Perfectly sound tools have been dropped by the users thereof through sheer carelessness and, if any speculating is to be done, that is as reasonable an explanation of this accident as has been advanced.

The opinion of the Court below contains a recital of substantially all of the evidence relating to the conditions in the pumproom, condition of the tools with which the petitioner was working and the circumstances surrounding the accident (108-112). The petitioner described the wrench as "old, beat up, all chewed up on the end." (9, 10). Neither the petitioner, nor any other witness, testified as to any facts from which it could be reasonably inferred that the wrench fell because the handle or grip was inadequate, or that its jaw did not fit the nuts. The terms used in connection with the wrench were descriptive adjectives of a general nature. They are nothing more than an over all description of the tool. They are conclusions unsup-

ported by any facts tending to establish any deficiencies in either the open-end or the handle. By stating that the wrench was defective, the petitioner was invading the province of the jury. When the burden of establishing the defective condition of a tool exists, as it did here, that burden was not discharged by simply saying that it was "defective or kind of beat up." There was no proof that either the open-end or the grip were deficient in any way. The slipping itself is not significant. It could have occurred for any number of reasons unconnected with the condition of the wrench. It should be pointed out that this operation involved the holding of the handle in one hand and striking it a succession of blows with the mallet. Fifteen of the twenty nuts were removed in that fashion. The slipping could have occurred from the failure of the petitioner to put the wrench on the nut properly, the failure to hit the wrench solidly, or the nuts themselves could have been somewhat worn. None of these conditions could give rise to the inference that the wrench was defective.

Counsel for the petitioner has fallen into the same error as the witnesses. He urges that it must follow that the petitioner was referring to the jaw of the wrench when referring to the wrench as "old, beaten, battered and chewed up," and that the jaw failed to grip the nuts because of a defective condition. (Br. p. 25) He does not point out to this Court, nor can he, the existence of any testimony relating to a deficiency in either the handle or the open-end portion of the wrench. He is no more entitled than were the witnesses to conclude that there was a failure to properly grip the nuts, because of a defective condition involving the wrench. The wrench must have gripped the nuts, or fifteen out of the twenty could not have been removed.

It did not rest with the Courts below to guess as to whether the petitioner and his witnesses were referring to one portion of the wrench as distinguished from the other in using the above mentioned descriptive adjectives. In order to make a case, it rested with the petitioner to pin point the fault by proof of facts relating to the jaw of the wrench which made it defective. This he did not do.

There was an early recognition by trial counsel for the petitioner of the obligation to establish specific faults. In the complaint were the following allegations relating to the wrench. (3, 4.)

> "* * * using an old defective wrench in an unseaworthy condition *in that the teeth and grip of the wrench were worn and defective.* * * *"
>
> "* * * when the defendant knew or in the exercise of ordinary care should have known that the *teeth of the wrench would not hold or be secure.*"
>
> "* * * when the defendant knew, or in the exercise of ordinary care should have known *of the condition of the defective teeth of the wrench.*"
>
> "in negligently and carelessly failing and neglecting to provide adequate, proper and seaworthy and reasonably safe appliances, to-wit: *a proper wrench without worn teeth.*" (Emphasis supplied.)

The allegations, above set forth, are somewhat surprising if, as counsel suggests, the absence of teeth in the wrench was known to all (19). These allegations, for obvious reasons, were abandoned upon a showing that the wrench had no teeth, but was open-ended. The petitioner was evidently prepared, initially, to attempt to show that the gripping portion of the wrench, i.e. the teeth, were worn. When the "teeth" were no longer in the case, no effort was made to show that the open-end jaw, (the gripping portion of the wrench) was worn or was defective in any other way. The omission was fatal.

POINT II.

a. The petitioner, himself, removed from the case the issues relating to the alleged lack of proper illumination and lack of room in which to work.

The charges of fault, apart from those relating to the wrench, were directed primarily to lack of illumination and cramped working space. The petitioner, himself, removed the issue of proper light from the case with the following testimony (26):

"Q. You had no difficulty seeing the bolts, did you?

A. No, sir."

The pumproom of a tanker, for obvious reasons, contains catwalks, pumps, pipe lines and valves. There was, however, sufficient room in the vicinity of the port centrifugal pump, where the plaintiff was working, so that lack of space had nothing to do with the dropping of the wrench on his toe. He had nearly completed the job when the wrench dropped and he makes no mention, in his testimony, of being impeded in any way by lack of space or the inability to use the wrench, or the mallet. His description of the progress of the work is as follows (22):

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

A. I had them all off but about five or six.

Q. You took those off without difficulty?

A. I had a hard time loosening them off.

Q. But you got them off.

A. Yes.

Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and you turned the nuts off?

A. I had a hard time taking them off.

Q. But you took them off?

A. Yes, the pumpman told me, 'Do the best you can.'

Q. You got them off and you got all but how many off at the time the accident occurred?

A. About five.

Q. And you were using the same wrench?

A. The same wrench.

Q. And the same mallet?

A. Same mallet all the way through."

The petitioner's criticism was directed at the tightness of the nuts. It is clearly apparent that he had sufficient space within which to use the wrench and the mallet.

The Court below points out that the petitioner's pleadings made no charge of inadequate light or cramped quarters in the pumproom (108). That Court further points out that the petitioner, in his testimony, made no claim that the progress of his work was in any way impaired by inadequate lighting, or cramped quarters (110). Finally, on this point, the Court concluded that there was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom, or the smallness of the area (110).

The question as to whether the work area, in general, was safe was, at no time, an issue in this litigation. The alleged failure to provide a safe place to work must be causally connected with the accident out of which the injuries arose. In connection with the specific alleged failures, (inadequate illumination and cramped quarters) the Court below, contrary to opposing counsel's statement (E p. 26) did not make its own conclusion of fact, but said that there was no testimony supporting the causal relationship (100). It rests with the trial Court to determine the existence or non-existence of supporting proof and there was, we submit, no invasion of the province of the jury.

b. There was no issue of fact as to whether the petitioner was or was not given proper instruction and supervision.

In the complaint filed herein the petitioner did not charge the respondent with a failure to give him proper instruction and supervision (3, 4). Nor is there the slightest suggestion in any of his testimony that he was not given such instruction and supervision as was necessary under the circumstances. The contrary, in fact, is true, for he was shown how to proceed with the job by the pumpman. His testimony in that connection is as follows (10):

"Q. You say that he ordered you to do the work?
A. Yes, he showed me how to remove the head bolts."

* * * * *

"Q. After he showed you did you start to work?
A. Yes, I continued on my pump."

Even if the pumpman had not shown the petitioner how to remove the nuts, the simplicity of the job was such that it did not require instruction or supervision. The petitioner was an experienced seaman. During the fit out and lay-up periods he worked on the boilers, pumps and valves (62). In light of the type of work that he was required to do, it is difficult to believe that he had not been in the pumproom prior to the accident, but, even if this is assumed to be true, it is without significance. The removal of nuts from the bolts on a pump casing does not suddenly become complicated and difficult because the pump happens to be in a strange pumproom. Prior to the accident he had removed fifteen or sixteen nuts, so he must have known how to do the job and the slipping of the wrench, on the seventeenth nut, could not, under any theory, have resulted from lack of instruction or supervision.

c. No jury question was presented as to whether the wrench was reasonably safe and suitable for its purpose.

Before a jury question could arise as to whether the wrench was reasonably safe and suitable for its purpose there must have been proof of the existence of a defect which made it unsafe or unsuitable for the removal of the nuts from the pump casing. We submit that this Court did not say in *Jacobs v. New York*, 315 U. S. 752, that a question of fact is always presented as to whether a tool is reasonably safe and suitable for its purpose. Opposing counsel, by so stating, (Br. p. 17) has, we believe, misconceived the purport of that decision. The District Court, in the case at bar, ruled that the *Jacobs* case was distinguishable, and, therefore, not controlling. (52, 53, 94, 95). That ruling was sound.

In the *Jacobs* case, this Court set forth a detailed summary of the testimony of the petitioner, which it said created a question for determination by the jury. (pp. 753, 754.) Reference was made to testimony that the wrench was "well worn," "had seen a lot of service," "was a loose fit," and "had a lot of play on it." There was also proof that there was "play in the jaws" and that the "play" at the end was "about one inch." (p. 754.) That testimony, as distinguished from the proof in the case at bar, related directly to the suitability of the working portion of the tool. The jaw of that wrench was "well worn" and had a "lot of play on it." There is a marked difference between that type of testimony and the adjectives used by the petitioner here. In the *Jacobs* case the looseness of the jaws and the fact that it was worn could create a reasonable inference that the wrench could not be safely used. The general reference to the wrench involved here as "beaten, battered, old or chewed up" could not possibly give rise to

such an inference. An open-end wrench can even be on the decrepit side and still be a very functional tool, providing the jaw is not worn and is a proper size for the nuts involved. Nowhere in this entire record is the open-end portion of the subject wrench described as worn or loose fitting. In describing the issues which it said should have been submitted to the jury, this Court stated (p. 756):

> "* * * That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure, although it had at least two days' and possibly three weeks' notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. * * *"

The instant case was not only devoid of proof creating an issue as to suitability, but the questions as to the failure to supply a new wrench and the foreseeability of harm were not present, in any form. The *Jacobs* case, decided by this Court on its own facts, is clearly not controlling here.

POINT III.

Under the decisions of this Court the granting of the respondent's motion for a directed verdict was justified.

The Court below, in affirming the action of the District Court, was acutely aware of the import of the recent decisions of this Court relating to the submission of causes to the jury. That Court stated (113, 114):

> "The recent cases of *Rogers v. Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson v. Moore-*

McCormack Lines, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury."

There is no language in the *Rogers* case, *supra*, which in any way precludes the Trial Court from making a judicial appraisal of the proofs. That decision does narrow the inquiry to a determination as to "whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death," and, if the appraisal is made and that test is not met, the case should be taken from the jury.

In the *Ferguson* case, *supra*, the Court of Appeals reversed a judgment in favor of the petitioner on the ground that it was "not within the realm of foreseeability" that petitioner would use a knife to chip frozen ice cream (p. 522). This Court concluded that there was sufficient proof of negligence to take the case to the jury because "* * * fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. * * *" (pp. 522, 523). In that case, as in the *Rogers* case, there was some evidence upon which liability could be predicated. Neither decision involved, as does the case at bar, an utter lack of evidence upon which liability could be properly based.

The doctrine of *Schulz v. Pennsylvania*, 350 U. S. 523, does not require a case to be sent to the jury unless there are disputed issues of fact to be determined, or conflicting inferences and conclusions to be resolved. In their absence there is simply no duty for the jury to perform.

The provisions of the Jones Act and the Federal Employers' Liability Act still require that injury sustained by a workman be caused in whole or in part by the employer's negligence and, where unseaworthiness is charged, the defect must be established as a contributory cause of the injury. One Court has suggested that plaintiffs have reached the point where they take the position, that every case, irrespective of the proof submitted, must be submitted to the jury. We do not believe that this Court intends in this type of case, or in any other, that the Trial Court abdicate its prerogative to determine whether a jury question has been presented. In *Kautz v. Delaware, Lackawanna & Western R. Co.*, 129 F. Supp. 777 (D. C. M. D. Penn. 1955) the Court said (p. 779):

> "Plaintiff contends that because of the decisions of the United States Supreme Court in *Lavender, Administrator v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Bailey, Administratrix v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Urie v. Thompson, Trustee*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441, this Court was bound to submit the issue of defendant's negligence to the jury.
>
> "*In support of his position, plaintiff argues that because of these decisions and a few others containing similar language, every case of injury to a railroad employee must be submitted to the jury.*" (Emphasis supplied.)

In further reference to the above cases the Court said (p. 779):

"* * * It is true that in some of those cases there is language used which would tend to diminish the power of a court to exercise its usual judicial control of a verdict where plaintiff's evidence falls below the minimum standard accepted as a basis for the establishment of liability. For example, in *Lavender v. Kurn, supra,* [327 U. S. 645, 66 S. Ct.] 744, it is stated:

> 'It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there was evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.'

"Although this statement seemingly enlarged the function of the jury under the facts of the case, *it requires that the evidence be such 'that fair-minded men may draw different inferences,' and that there be an 'evidentiary basis'* to support the jury's verdict. * * *" (Emphasis supplied.)

There is, we submit, nothing in the decisions of this Court, upon which the petitioner relies which nullifies, in any way, the requirement that the evidence establishing

the negligence of the respondent must be reasonable before an issue for the jury is presented. At two places in this Court's opinion in the *Rogers* case, *supra*, there is reference to the requirement that there must be a "reasonable basis" for the conclusion that negligence exists and that it played some part in the injury or death. That requirement is not satisfied by proof that is not "reasonable" and it rests with the Court and the Court alone to evaluate the proof in that regard. We concede that it is not the function of the Trial Court to weigh conflicting evidence, but it most assuredly has the initial right and obligation to determine whether there is any proof concerning which reasonable minds could or could not disagree. That has been and still is, we believe, the time honored test.

Where there is no proof of negligence, this Court has not hesitated to approve the granting of a motion for judgment notwithstanding the verdict and has ruled that such an action by the Trial Court did not invade the province of the jury. *Moore v. Chesapeake & O. R. Co.*, 340 U. S. 573, 578.

In *Eckenrode, Administratrix v. Pennsylvania Railroad Co.*, 335 U. S. 329, which was a death action under the Federal Employers' Liability Act, this Court said (p. 330):

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her.
>
> "Accordingly, the judgment is affirmed."

The same question is presented to this Court in the case at bar. The Court, after consideration of this record should, we respectfully urge, reach the same conclusion.

POINT IV.

The testimony stricken by the Trial Court added nothing to the descriptive testimony of the petitioner.

The only portion of the testimony of Harold F. Isenbach which was stricken by the Trial Court related to events which occurred either on December 28, 1955 (date of accident) or thereabouts. The Court's question to the witness and its ruling on the motion to strike were as follows (47):

> "The Court: You told the jury about the things you did, about checking the tools in the pumproom, and those other answers given by you, either as of the date of December 28th when the man says he was hurt or thereabouts. Are you saying now you weren't on that boat after the 19th of December?
>
> "The Witness: Yes, sir.
>
> "Mr. Ray: I move that the witness's testimony be stricken.
>
> "The Court: Ladies and gentlemen, everything this man said about what he had seen on or about that day in his previous testimony, all of which relating to December 28 when this plaintiff was hurt, and the date immediately around there, has to go out. He went off the ship December 19th and knows from his own discharge book he had no business talking about or mentioning it, and no business asking any questions about it if he wasn't there. Go ahead."

The exclusion of the above mentioned portion of Isenbach's testimony was obviously proper. The jury in listening to his testimony concerning conditions which he said existed on or about December 28th, would, of course,

assume that he was speaking from personal knowledge. His absence from the vessel during the indicated period made his testimony hearsay or worse.

The doctrine of the existence of an object at a given time, based upon prior or subsequent existence, to which reference is made by opposing counsel (Br. pp. 38-41), is not applicable here. Isenbach's testimony did not relate to the prior condition of the tools, but to their alleged condition at or near the time of the accident. He did not describe their condition over a five year period, but confined his testimony to December 1955. In that connection he stated (41, 42):

> "Q. And can you describe the condition of those tools in December, 1955?
>
> A. Well, they were in beaten and battered condition, as usual.
>
> Q. Now, did you have an opportunity—wait a minute. When you say they are beaten and battered condition, can you describe them to the jury, please?
>
> A. Well, none of the tools were very, you wouldn't call them new tools but they had been very beaten and battered, perhaps there for some time.
>
> Q. What did the tools consits of?
>
> A. Various wrenches, monkey wrenches and pliers and the wrenches had long iron bars and things of that nature."

Even though Isenbach's testimony had been admissible it would not have strengthened the petitioner's case. It contained general references to all of the tools in the pumproom and the only description given was that they "were beaten and battered."

(p. 578):

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict. * * *" (Emphasis supplied.)

These decisions confirm the doctrine that a defendant in a negligence action is only required to defend against the specific allegations of fault which are asserted against him. Even in this day, when the technical requirements of common law pleadings are not adhered to, the defendant has the right to have the case tried and his responsibility resolved within the framework of the issues as determined by the pleadings.

The Trial Court's attitude or state of mind was not at issue in the Court below, nor is it at issue here. Its granting of the motion for a directed verdict was predicated upon the absence of probative testimony and upon that alone. That action received the unanimous approval of the Court below.

CONCLUSION.

The respondent respectfully submits that the conclusions of the lower Court are correct and free from error and that the judgment should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1960.

Thomas Michalic, Petitioner, v. Cleveland Tankers, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 7, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

The petitioner asks damages for personal injuries he allegedly sustained in a shipboard accident while a crew member aboard the respondent's Great Lakes vessel, the tanker, *Orion*. His complaint alleges respondent's liability both for negligence under the Jones Act, 46 U. S. C. § 688, and for unseaworthiness under the general maritime law;[1] a claim for maintenance and cure is also alleged. The parties settled the claim for maintenance and cure at the trial, which was before a jury in the District Court for the Northern District of Ohio. Judgment was entered for the respondent on the unseaworthiness and Jones Act claims upon a verdict directed by the trial judge on the ground of insufficiency of the evidence. The Court of Appeals for the Sixth Circuit affirmed. 271 F. 2d 194. We granted certiorari, 362 U. S. 909.

Michalic claims that in a shipboard accident on December 28, 1955, a two and one-half-pound wrench dropped on his left great toe. Michalic was afflicted with Buerger's

[1] The parties tried the case in the District Court, and argued it here and in the Court of Appeals, as raising issues both of negligence under the Jones Act and unseaworthiness under the general maritime law. We therefore need not be concerned with the confusing language of the complaint and whether it may be read as pleading a claim solely on the theory of negligence.

Disease when he joined the *Orion* three months earlier as a fireman in the engine room. We are informed by the testimony of one of the medical witnesses that Buerger's Disease "is a disease of unknown origin . . . it produces a narrowing of the blood supply going to the foot through the arteries, and it runs a very foreseeable course; it is slowly progressive in most cases and leads to progressive loss of blood supply to the extremities involving usually the legs"; for one afflicted with the disease to drop "a hammer on his toe . . . is a very serious thing and frequently leads to amputation . . . . Because the circulation is already impaired and the wound will not heal properly, and any appreciable trauma will frequently lead to gangrene."

Michalic did not report the accident at the time but continued working until January 6, 1956, a week later, when the vessel was laid up for the winter. Meanwhile he treated the toe every night after work in hot water and Epsom salts. He was at his home from January 6 to March 15 and used hot boric acid soaks "practically every day." He was called back to the *Orion* on March 15. On April 1, 1956, he reported to the *Orion's* captain that "[m]y leg was so bad, so painful, I couldn't take it no more . . . I want a hospital ticket." The Captain gave him the ticket after filling out a report in which he stated that Michalic told him that on December 28, 1955, "While working with pumpman in pumproom man said he dropped a wrench on his foot and his toe has been sore ever since." This was the first notice respondent had of any accident.

At the hospital in April, a diagnosis was made of "an infected left great toenail and gangrene of the left great toe secondary to the Buerger's Disease." During the spring three amputations were performed on the left leg, first the great left toe, next the left leg below the knee and

then part of the leg above the knee. Medical experts, three on behalf of the petitioner and one for the respondent, differed whether, assuming that the wrench dropped on Michalic's left great toe on December 28, there was a causal connection between that trauma and the amputations. This plainly presented a question for the jury's determination. *Sentilles* v. *Inter-Caribbean Corp.*, 361 U. S. 107, and we do not understand that the respondent contends otherwise.

The basic dispute between the parties is as to the sufficiency of the proofs to justify the jury's finding with reason that respondent furnished Michalic with a wrench which was not reasonably fit for its intended use. Here a distinction should be noticed between the unseaworthiness and Jones Act claims in this regard. The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *The Osceola*, 189 U. S. 158; *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629; and this duty is completely independent of the owner's duty under the Jones Act to exercise reasonable care. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. The differences are stated in *Cox* v. *Esso Shipping Co.*, *supra*:

> "One is an absolute duty, the other is due care. Where . . . the ultimate issue . . . [is] seaworthiness of the gear . . . . The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i. e., reasonable prudence to select and keep in order reasonably suitable appliances. Defects which would not have been known

to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." 247 F. 2d, at 637.

Thus the question under Michalic's unseaworthiness claim is the single one as to the sufficiency of the proofs to raise a jury question whether the wrench furnished Michalic was a reasonably suitable appliance for the task he was assigned. To support the Jones Act claim, however, the evidence must also be sufficient to raise a jury question whether the respondent failed to exercise due care in furnishing a wrench which was not a reasonably suitable appliance.

The wrench dropped on Michalic's foot while he was using it to unscrew nuts from bolts on the casing of a centrifugal pump in the pumproom. He had been assigned this task by the pumpman after the first assistant engineer sent him from the engine room to the pumproom to help ready the pumps for the vessel's winter lay-up. There were about twenty-five 1⅝" nuts tightly secured to the bolts on the casing. The pumpman gave him a 1⅝" straight end wrench weighing two and one-half pounds and ten to eleven inches long, and also a mallet. The pump was located alongside and some inches below a catwalk and Michalic had to step down from the catwalk to reach the casing. His task required the gripping of each nut in the claw of the wrench and the hammering of the side of the wrench with the mallet to apply pressure to loosen it. Michalic had removed all but a few of the nuts when he "had hold of a nut" with the wrench and "I hit it [the wrench] with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe. . . . Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe."

Michalic contends that the proofs were sufficient to justify the jury in finding with reason that there was play

in the claw of the wrench which prevented a tight grip on the nut, thus entitling him to the jury's determination of his unseaworthiness claim; and were [redacted] sufficient to justify the jury in finding with reason that the respondent negligently furnished him with a defective wrench, thus entitling him also to the jury's determination of his Jones Act claim.[2] The evidence viewed in a light favorable to him was as follows: The wrench and other pumproom tools were kept in the pumproom tool box and were used only when the vessel was being prepared for lay-up. The tools were four or five years old. Because of the danger of fire, the tools, including the wrench and mallet which Michalic used, were made of a special spark-proof alloy. The second mate, who had left the *Orion* on December 19, testified that the tools were bronze because "Bronze tools are for non-striking." It was the practice to inspect the pumproom tools and replace worn ones before their use at lay-up time but the first assistant engineer who testified to the practice did not say this inspection was made in 1955; and the pumpman testified that "It could be" that no one looked at the tool box for nine months before December 28. The second mate testified that the tools "had been very beaten and battered, perhaps there for some time." Michalic testified that he noticed when the pumpman gave him the wrench that it was an "old beat-up wrench . . . all chewed up on the end." Michalic said that when he started work "the wrench was slipping off the nuts; it slipped off every one of them." He "had

[2] The trial judge ordered the second mate's testimony to be stricken from the record when it appeared that the mate left the *Orion* on December 19. The Court of Appeals nevertheless considered the testimony so far as it concerned the condition of the tools. 271 F. 2d, p. 196. We think the action of the Court of Appeals was correct in light of the testimony of respondent's own witnesses, from which it is reasonable to infer that the tools used on December 28 had been in the toolbox for some time prior to December 19.

a hard time loosening them off." He protested to the pumpman that "This wrench keeps slipping off" and the pumpman answered "Never mind about that, do the job as best you can."

The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, because "on the theory the grip is worn . . . there is never any mention of the grip in the case . . . ." The Court of Appeals took the same view, saying "There was no evidence that the open or jaw end of the wrench was in any way deficient . . . [t]he fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench." 271 F. 2d, p. 199. We think that both lower courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob* v. *New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508, n. 17.[3] The jury, on this record, with the inferences permissible from the respondent's own testimony that inspections were necessary to replace tools of this special alloy because of wear which impaired their effectiveness, could reasonably have found that the wrench repeatedly slipped from the nuts because the jaw of the wrench did not properly grip them. Plainly the jury,

[3] The trial judge rested his action partly on a supposed variance between the complaint and the proof at the trial. The complaint alleged that the wrench was "an old defective wrench in an unseaworthy condition in that the *teeth* and grip of the wrench were worn and defective." (Emphasis supplied.) Michalic and all the witnesses at the trial who testified about the wrench described its claw as smooth faced and without teeth. We see no fatal variance and in any event respondent waived reliance on any by expressly disclaiming surprise at the trial.

with reason, could infer that the colloquy between Michalic and the pumpman, and Michalic's testimony as to slipping, related to the function of the jaw of the wrench in gripping the nuts and that there was play in it which caused the wrench to slip off. Thus the proofs sufficed to raise questions for the jury's determination of both the unseaworthiness and Jones Act claims. "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes . . . ." *Rogers* v. *Missouri Pacific R. Co.*, *supra*, p. 506.[4]

The Jones Act claim is double-barreled. Michalic adds a charge of negligent failure to provide him with a safe place to work to the charge of negligence in furnishing him with a defective wrench. However, the case was not tried, nor is it argued here, on the basis that the charge of negligence in failing to provide a safe place to work rests solely on evidence tending to show a cramped and poorly lighted working space, regardless of the suitability of the wrench. On the contrary, Michalic also makes the allegedly defective wrench the basis of this charge, arguing in effect that the described conditions under which he was required to do the work increased the hazard from the use of the defective wrench. Under that theory, the relevance of the testimony is only to the charge of furnishing a defective

[4] The petitioner does not invoke the District Court's jurisdiction on grounds of diversity of citizenship. Thus, there is jurisdiction on the law side of the court of the unseaworthiness claim only as "pendent" to jurisdiction under the Jones Act. *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380–381. However, the question expressly reserved in *Romero*, p. 381—whether the District Court may submit the "pendent" claim to the jury—is not presented by the case. The *Orion* was a Great Lakes vessel and the petitioner is entitled to a jury trial of his unseaworthiness claim under 28 U. S. C. § 1873. See *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253; *The Western States*, 159 F. 354; *Jenkins* v. *Roderick*, 150 F. Supp. 299.

wrench and the causal connection between that act and his injury. Phrasing the claim as a failure to provide a safe place to work therefore adds nothing to Michalic's case, and he was not entitled to have that claim submitted to the jury as an additional ground of the respondent's alleged liability.

The judgment of the Court of Appeals is reversed and the cause remanded to the District Court for a new trial.

It is so ordered.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari was improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1960.

Thomas Michalic, Petitioner, v. Cleveland Tankers, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 7, 1960.]

Mr. Justice Harlan, with whom Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

At the opening of a Term which finds the Court's docket crowded with more important and difficult litigation than in many years, it is not without irony that we should be witnessing among the first matters to be heard a routine negligence (and unseaworthiness)[1] case involving only issues of fact. I continue to believe that such cases, distressing and important as they are for unsuccessful plaintiffs, do not belong in this Court. See dissenting opinions in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, at 524, 559.

The District Court, finding that the evidence presented no questions for the jury, directed a verdict for the respondent. The Court of Appeals, in an opinion which manifests a conscientious effort to follow the precepts of the *Rogers* case, unanimously affirmed, after a painstaking assessment of the record. 271 F. 2d 194. My own examination of the record and of the opinion of the Court of Appeals convinces me that there is no warrant for this Court overriding the views of the two lower courts.

The core of petitioner's case was the condition of the wrench, his unsafe-place-to-work theory having evaporated in thin air, as the Court recognizes. Having had to abandon his original theory that the claw of the wrench

[1] See note 1 of the Court's opinion, *ante*, p. —.

had defective teeth (since the wrench was toothless), petitioner testified (1) that the instrument "was an old beat up wrench . . . all chewed up on the end" (whether at the claw or handle does not appear); and (2) that the wrench had slipped off nuts at various times during the operation (albeit petitioner had before the accident successfully removed some 15 out of 20 nuts without mishap).

While the Court, in stating that "there was no direct evidence of play in the jaw of the wrench," seems to recognize that this testimony did not suffice to show any actionable flaw in the wrench, it nonetheless concludes that the jury should have been permitted to infer one in light of two other factors. These are (1) the second mate's testimony that as of some 10 days before the accident,[2] the tools in the pumproom tool box "had been very beaten and battered" (whether at the claw or handle, or anywhere else, does not appear); and (2) other evidence which, as I read its opinion, the Court takes as establishing that the tools were old and infrequently inspected. (Actually the record shows that the tools had been used only four

[2] The exact date of the accident is obscure. Petitioner did not report the alleged accident for some six months after he claimed it occurred. The then master testified with respect to the filling out of the company accident form:

"Q. How did you arrive at the date of December 28, 1955.

"A. Well, it was merely an arbitrary date. It was kind of hard to reckon back at the time this [the form] was made up. This was made up on the 1st of April following. This may have been any time in December. It may have been the 21st, it may have been any time during that period. . . .

"The COURT: That is the date plaintiff gave. Were you on the vessel on that day, December 28?

"The WITNESS: Not to my recollection, sir, but when we typed this up Mr. Michalic, the plaintiff, gave me that as the approximate date. He didn't really know exactly when it would have been."

or five times and that the wrench had been inspected just before it was handed to petitioner.[3]

Judged by any reasonable standard this evidence, fragmentized or synthesized as one may please, did not in my opinion make a case for the jury. The additional factors on which the Court relies add nothing to the inherent deficiencies of petitioner's testimony which the Court seems to recognize did not of itself make out a case of either negligence or unseaworthiness. If it is permissible for a jury to rationalize "into being" a defective wrench from this sort of evidence, then wrenches have indeed become dangerous weapons for those operating vessels on the Great Lakes. If the rule of *Rogers* means that in FELA cases[4] trial courts are deprived of all significant control over jury verdicts, and juries are in effect to be allowed to roam at large, I think the lower federal courts should be so told. See *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 25 (dissenting opinion). At least this would be better than continuing to require the lower courts to operate in what must be an atmosphere of increasing bewilderment over what is expected of them in these federal negligence cases.

I would affirm.

[3] The pumpman, whom petitioner was helping, testified that the wrench used by petitioner was one of three that had been procured four or five years before; that they were used only once a year; and that he had inspected the wrenches just before taking them out of the tool chest on the day in question.

[4] The Jones Act, here involved, incorporates the standards of the Federal Employers' Liability Act.